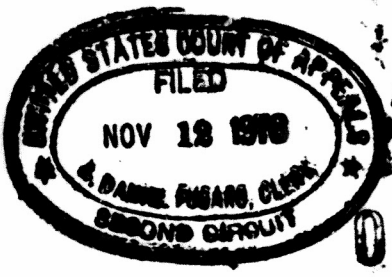
United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT



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ORIGINAL

To be argued by
THOMAS V. McMAHON

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United States Court of Appeals

FOR THE SECOND CIRCUIT

ELIZABETH C. MONROE,

Plaintiff-Appellee,

against

ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. McARTHUR, Trustees of the Property of Penn Central Transportation Company, Debtor,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

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Statement

This is an appeal from a final judgment entered in the office of the Clerk of the United States District Court for the Southern District of New York on July 30th, 1976 in favor of the plaintiff, Elizabeth C. Monroe, and against Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees of the Property of the Penn Central Transportation Company, Debtor, for the sum of $25,000.

Trial was had before Honorable Marvin E. Frankel, United States District Court Judge, and a jury, in the United States District Court for the Southern District of

New York on July 26th, 27th and 28th, 1976, and the jury returned a verdict for $25,000 in favor of plaintiff, Elizabeth C. Monroe, against Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees of the Property of the Penn Central Transportation Company, Debtor.

The action was brought to recover a sum in excess of $10,000 on behalf of plaintiff, Elizabeth C. Monroe, as a result of personal injuries said to have been sustained by plaintiff at Penn Station, New York City, on April 13, 1975. The action was originally brought in the Supreme Court of the State of New York, County of New York, and removed to the United States District Court for the Southern District of New York, upon the petition for removal of the defendants on the ground of diversity of citizenship (Title 28, United States Code, Section 1441, *et seq.*).

In her complaint, plaintiff, Elizabeth C. Monroe, alleged negligence against the defendant Penn Central Transportation Company in the ownership, operation, management, maintenance and control of an escalator known as the B-7 escalator located in the said Penn Station and connecting a portion of the main concourse with the platform for tracks 12 and 13 at Penn Station.

The case went to the jury on the afore-stated issue of the negligence of the defendant Penn Central Transportation Company in the ownership, operation, management, maintenance and control of the escalator known as the B-7 escalator.

Specification of Errors

(1) The Court below erred as a matter of law in refusing to charge the jury in accordance with defendants' fourth requested charge, on the issue of contributory negligence.

(2) The Court below erred as a matter of law in refusing to charge the jury in accordance with defendants' additional request to charge on the issue of the proper operating condition of the B-7 escalator.

The Facts

Plaintiff, Elizabeth C. Monroe, is a 78 year old widow who resides in Queens, New York (163-64a).

On April 13, 1975 at approximately 8:25 a.m., plaintiff arrived at Penn Station in New York City in order to purchase a ticket on the 10:00 a.m. train from New York City to Washington, D.C., where she was going to visit her two sisters. Upon arriving at Penn Station, plaintiff had breakfast at a Horn and Hardart Restaurant in Penn Station and then waited in the passenger waiting room (163-165a).

At approximately 9:45 a.m. plaintiff left the waiting room, walked over to Conrail usher, Mr. Lloyd Cadogan, and asked him what track the Washington train would be on. Mr. Cadogan informed plaintiff that they were then at the Washington track and that he would soon open the doors to the track (165(a)-166a).

Plaintiff testified that at about 9:43 a.m., Mr. Cadogan opened the doors to the escalator and told her the train was ready for boarding. Plaintiff further testified that she was the first person on the escalator and that as she descended, she held the escalator handrail tightly with her left hand (166-68a). When plaintiff had descended approximately one-quarter of the way she suddenly noticed that her left hand was going backwards and that the escalator had reversed direction (168a, 173a, 222a). Plaintiff stated that she was uncertain whether or not

the escalator steps had in fact reversed direction or whether her hand was merely being pulled backwards. However, she stated that she did know that the handrail was going backwards and that it was pulling her back and to the left side (208a, 213-15a, 221a). Despite the fact that she was being pulled, however, plaintiff continued to hold the hand rail tightly until the escalator had been stopped by the usher, who had heard a commotion and turned the escalator off (135, 166a, 203a).

Plaintiff testified that by this time she had been pulled backward and had to be held up by the people behind her on the escalator (216). She expressly denied having either stumbled or fallen, or having experienced any weakness or dizziness (176a), although she admitted having been under medical treatment for approximately two years for an arthritic condition in both of her knees (204a). She further testified that her right foot had gotten caught on the escalator and had been injured, though she subsequently stated that she did not, in fact, know whether or not her foot had gotten caught, but had merely assumed that "That's the only way it could have gotten broken" (214a).

According to plaintiff's testimony, when the escalator stopped she was carried to the top of the escalator, placed in a chair, and given first aid. She was then taken by ambulance to French Hospital in Manhattan where she was treated by Dr. Alexander Papas and diagnosed as having suffered a trimalleolar fracture to the right ankle.

Plaintiff's account of her injury is in marked contrast to the accounts given by defendants' witnesses. Lloyd Cadogan, the Conrail usher who activated escalator B-7 on April 13th, stated that contrary to her testimony, plaintiff was not the first passenger on the escalator (270-71a). Mr. Cadogan further stated that, contrary to

plaintiff's testimony, plaintiff did in fact fall while on the escalator. He testified that, after turning the escalator on he walked a few steps away to allow the passengers to board. Upon hearing cries that someone had fallen (273a), he returned to the escalator where he saw plaintiff "collapsed" and "crumbled" on the escalator steps (137a, 273-74a). Most importantly, however, Mr. Cadogan testified emphatically that the escalator was in proper operating condition both before and after plaintiff's injury. He indicated that he had personally inspected the escalator before opening it to passengers that morning and had personal knowledge that it had been in use again that same day after plaintiff's accident (272-73a, 275a).

Mr. Cadogan's testimony concerning the escalator's proper operating condition on April 13th is corroborated by the testimony of Mr. William Jackson and Mr. Harold Russell, trained escalator maintenance men, who testified that the B-7 escalator had been personally inspected on the day before and on the day after plaintiff's injury, and was found to be in good working order on both days (320-21a, 326).

Plaintiff's account of the events occurring on April 13th is further contradicted by the testimony of Patrolman Richard Sova, Penn Central police officer who first responded to the scene of plaintiff's accident. Patrolman Sova testified that he arrived at the escalator at a time when plaintiff was at the top of the escalator with Mr. Cadogan (45a). Patrolman Sova approached plaintiff, asked her what had happened, and was told by plaintiff that "she was descending on the escalator and her foot was caught" (46a, 63a). The police officer then made an inspection of the area to determine whether there were any hazards on the escalator and whether or not the escalator was properly working (49a, 331-33a). The officer's inspection conducted only a few minutes after

plaintiff's accident (333a), revealed that the escalator was functioning properly (331a). Patrolman Sova further testified that on arriving at the escalator, he requested that witnesses to the accident remain at the scene (336). According to his testimony, he then obtained a wheelchair for plaintiff and had an ambulance summoned (337a). When he returned to talk to witnesses, both witnesses and the Washington train had left (337a). Subsequently, however, Patrolman Sova completed a Penn Central Police Department Accident Report in which the officer stated that plaintiff had advised him at the scene that her foot had gotten caught on the escalator steps "causing her to fall" (63a, see Pl. exhibit 1)

Patrolman Sova's accident report, indicating that plaintiff may have fallen, is supported by the medical testimony of Dr. Papas, plaintiff's treating physician at French Hospital. Dr. Papas indicated at trial that plaintiff's injury, a trimalleolar fracture, might have been caused by a fall, which fall would have placed on the plaintiff's bone the weight necessary to cause a fracture similar to plaintiff's injury (312a). The doctor testified that plaintiff's hospital "smear" reported that plaintiff "was caught in the escalator and fell" (313a).

On the basis of these facts, defendants requested the trial court to instruct the jury on the issues of contributory negligence and the proper operating condition of the B-7 escalator (defendants' requested instruction No. 4; defendants' additional request to charge). The trial court denied both requests, to which denial proper exception was taken by defendants (346-49a). Defendants herein appeal the trial court's denial of the requested instructions.

ARGUMENT

POINT I

Sufficient evidence of contributory negligence was admitted so as to require the court to grant defendants' requested instructions on contributory negligence.

A. Trial court is obliged to grant a defendant's requested instruction on contributory negligence where such instruction is consistent with the evidence.

A federal court's obligation to properly charge a jury is governed by Rule 51 of the Federal Rules of Civil Procedure title 28, U.S.C.A., and long established case law. Rule 51 provides:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury." Fed. R. Civ. P. 51.

Federal case law has made clear that a trial court possesses an independent, affirmative obligation to instruct the jury on the law governing all material issues of a particular case. The court itself bears the ultimate

responsibility for instructing the jury to the fullest and clearest extent necessary to enable the jury to intelligently determine all questions of fact presented by the evidence. See *Reyes* v. *Wyeth Laboratories*, 498 F.2d 1264 (5th Cir. 1974); *Turner Constr. Co.* v. *Houlihan*, 240 F.2d 435 (1st Cir. 1957); *Chicago & N.W. R.R.* v. *Green*, 164 F.2d 55 (8th Cir. 1947). Failure of the trial court to provide a jury with complete and correct instructions constitutes reversible error if, in light of the instructions given, the jury was likely to have be misled or to have reached a different verdict. *Delancey* v. *Motichek Towing Service, Inc.*, 427 F.2d 897 (5th Cir. 1970); *Turner Construction Co.* v. *Houlihan*, supra. As the Fifth Circuit has expressly stated, reversing a trial court's failure to give requested instructions:

> "In a Federal District Court, the Judge has an obligation to charge on the essential elements of the case and instruct the jury as to the law on matters which developments of the trial have made significant and important." *Lind* v. *Aetna Casualty & Surety Co.*, 374 F.2d 377, 380 (5th Cir. 1967), *quoting Marshall* v. *Isthmian Lines, Inc.*, 334 F.2d 131, 137 (5th Cir. 1964).

Furthermore, federal courts have long established that in addition to a trial court's general responsibility to instruct a jury on the law governing all material questions of fact, the court bears a further obligation to charge the jury in accordance with the substance of any instructions which a party specifically requests, provided that such instructions are "consistent" with the evidence. *Gillentine* v. *McKeand*, 426 F.2d 717, 724 v. 24 (1st Cir. 1970); *Lind* v. *Aetna Casualty & Surety Co.*, supra. (requested instruction in accord with evidence "must be granted" unless otherwise covered); *Richardson* v. *Walsh Constr. Co.*, 334 F.2d 334 (3rd Cir. 1964). Thus, under

federal law, a party has an absolute right to have the jury instructed in accordance with his legal theories of a case, if evidence exists to support such theories. See *Delancey* v. *Motinek Towing Service, Inc., supra; Oliveras* v. *United States Lines Co.,* 318 F.2d 890, 892 (2nd Cir. 1963). In a 1947 *res ipsa loquitur* case, for example, where defendant requested an instruction that it could not be found liable for failure to discover a hidden defect, the Eighth Circuit reversed the lower court's denial of the instruction, stating:

> "The requested instruction sought to expressly put before the jury defendant's theory of the accident and to apply concretely to that theory if the jury accepted it the test for determining defendant's liability in the situation . . . The refusal of the court to give the requested instruction, either in its tendered form or in a restatement of its material substance, was error. It has long been the rule that, as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case, if there is evidence to support it and if a proper request for such an instruction is made . . . *Chicago & N.W. R.R.* v. *Green, supra* at 61 (citations omitted).

The standard utilized in determining whether sufficient evidence exists to require a trial court to give a requested instruction is whether or not "there was such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Merritt-Chapman & Scott Corp.* v. *Frazier,* 289 F.2d 849, 856 (9th Cir. 1961), *quoting Consolidated Edison Co.* v. *N.L.R.B.,* 305 U.S. 197, 229 (1938). See: *Barrett* v. *Robinson,* 65 F.R.D. 652 (E.D. Pa. 1975); *Radiation Dynamics Inc.* v. *Goldmuntz,* 464 F.2d 876, 885 (2nd Cir. 1972); *Nuckoles* v. *F.W. Woolworth Co.,* 372 F.2d 286, 288-89 (4th Cir. 1967); *Julien*

J. Studley, Inc. v. *Gulf Oil Corp.*, 386 F.2d 161, 163 (2nd Cir. 1961); *Schiemann* v. *Grace Line, Inc.*, 269 F.2d 596, 598 (2nd Cir. 1959). In applying this standard to the issue of contributory negligence, federal courts have held that such issue generally constitutes a question of fact for the jury. Accordingly, whenever doubt exists as to the facts of a particular case, from which the jury might reasonably draw differing conclusions, the issue of contributory negligence must be left to the jury. See: *Nuckoles* v. *F.W. Woolworth Co., supra; Barrett* v. *Robinson, supra; Mroz* v. *Dravo Corp.*, 429 F.2d 1156, 1163-64 (3rd Cir. 1970) (sufficient to take contributory negligence to jury if sum of evidence leaves issue in doubt).

As the Fifth Circuit has declared:

> "It is well established that 'except in palpably clear, plain and undisputed cases' . . . questions of negligence and contributory negligence must be decided by a jury. *Gross* v. *Southern Ry.*, 414 F.2d 292, 301 (5th Cir. 1969).

New York case law applicable to *Monroe* has similarly established that the issue of contributory negligence constitutes "almost exclusively" a question of fact for jury determination. *Wartels* v. *County Asphalt Inc.*, 29 N.Y. 2d 372, 379 (1972); *Spier* v. *Barker*, 42 A.D.2d 428 (3rd Dept. 1973); *aff'd* 35 N.Y.2d 444 (1974); *Holohan* v. *Niagara Mohawk Power Corp.*, 42 A.D.2d 363 (3rd Dept. 1973); *Kenton* v. *N.Y.*, 29 A.D.2d 64, 65 (3rd Dept. 1967) (Issue of contributory negligence "peculiarly within the province" of trier-of-fact). The test to be employed by New York courts in determining whether or not the issue of contributory negligence may be withdrawn from the jury as a matter of law is whether "there is no dispute upon the facts, and only one conclusion can be drawn therefrom." *Siivonen* v. *City of Oneida*, 38 A.D.2d 654, 655

(3rd Dept. 1971), *quoting Nelson* v. *Nygren*, 259 N.Y. 71, 76 (1932). The test is narrowly applied, with the question of contributory negligence reserved for jury determination, as a matter of policy, in all but the clearest of cases. Thus, in a 1971 case, the New York Court of Appeals reversed an Appellate Division finding that plaintiff was contributorily negligent as a matter of law, holding:

> "[T]he general softening of the rigidities of the doctrine of contributory negligence in New York may be seen in recent cases where the injured person is himself suing and thus has the burden of showing he was not negligent. *The tendency is to treat it almost always as a question of fact.* It would seem to follow then, that on any fair analysis of New York law, the question of Rossman's contributory negligence . . . would be one for the jury." *Rossman* v. *La Grega*, 28 N.Y.2d 300, 305 (1971) (emphasis added).

B. Evidence of plaintiff's contributory negligence admitted at trial was sufficient to support defendants' requested instruction on Contributory Negligence.

It is submitted that substantial evidence of plaintiff's lack of due care was admitted at trial from which the jury could have reasonably concluded that plaintiff had not met her burden of proving freedom from contributory negligence. Consequently the trial court was obliged to instruct the jury in accordance with defendants' requested instruction; the trial court's failure to so instruct the jury constituted reversible error.

Plaintiff's own testimonial account of her accident provides a complete and sufficient basis from which the jury could have found contributory negligence. Plaintiff testi-

fied that at the time of her injury, she was riding the escalator identified as escalator B-7 holding on to the handrail tightly with her left hand. In her right hand she was carrying a small suitcase. Suddenly she noticed that her left hand was "going," or being pulled, backwards causing her to be twisted to the left side of the stairs, and backward (9168a, 208-09a, 212a, 215a). While much of plaintiff's testimony is confusing or conflicting concerning the manner in which she was injured, she testified clearly and precisely that she at no time released or loosened her grip on the handrail; rather she stated that she continued to hold on tightly (208a, 215a).

In plaintiff's own words:

> "I know the handrail . . . was going back and that pulled me" (215a)
>
> "I saw my hand going back, I saw my hand—I thought they were reversing it.
>
> [Q. When you saw it going back, did you release your hand?]
>
> No. I held on tight and I thought "Well, I will hold on. I guess they are turning it around." (208a)

Having failed to release the handrail, plaintiff was pulled backwards and injured.

Characterization of plaintiff's actions as either "reasonable" or "unreasonable" under all the facts and circumstances of the particular situation is clearly a function for the jury. As trier-of-fact, the jury is entitled, and obliged, to exercise its judgment in determining whether given conduct constitutes the exercise of due care. As the Fifth Circuit has so clearly expressed:

> "There is no fixed standard in the law by which a court may say in every case what conduct will be

> considered reasonable and prudent and what shall constitute due care. . . . Accordingly, the law has relegated the determination of such questions to the trier of facts. It is for them to note the special circumstances and surroundings of each particular case and then to say whether the conduct of the parties measured up to the standard required by law." *Gross* v. *Southern Ry. supra,* at 301, *quoting Southern Ry.* v. *U.S.,* 197 F.2d 922, 925 (5th Cir. 1955).

The trial court's actions in determining, as a matter of law that plaintiff's conduct constituted "due care" (348-49a) wrongfully usurped the jury's necessary function. Indeed, to suggest that under these circumstances, plaintiff's "due care" was "palpably clear, plain and undisputed," and that "only one conclusion can be drawn" from the facts in evidence is clearly erroneous. See: *Gross* v. *Southern Ry., supra* at 30; *Siivonen* v. *City of Oneida, supra.*

Accordingly, in a matter analogous to the instant case, the Fifth Circuit has found that the question of whether a seventy year old woman, injured when she stepped on a small box in defendant's store, had in fact exercised reasonable care in looking for hazardous objects in her path constituted a question of fact to be determined by the jury. *Nuckoles* v. *F. W. Woolworth Co., supra.* In reversing the trial court's determination that plaintiff was contributorily negligent as a matter of law, the Court held:

> "Generally, the question of contributory negligence is for the jury when it arises upon a state of facts from which reasonable men might draw different conclusions either as to the facts or the conclusions or inferences to be drawn from the facts." 372

F.2d at 288, *quoting* 38 Am. Jur Negligence § 348, at 1052 (1949). See: *Rivera* v. *Purkan Associates, Inc.*, 38 A.D.2d 965 (2nd Dept. 1972) (whether plaintiff's descending darkened stairway while holding banister constituted contributory negligence was an issue of fact for jury resolution).

In addition to the question of contributory negligence posed by plaintiff's failure to release the escalator handrail, substantial evidence was admitted at trial from which the jury could have found that plaintiff had failed to exercise due care in (1) using the escalator alone and without the aid of a cane or other supportive device, knowing that due to her advanced age and impaired physical abilities any such use would involve a substantial risk of accident or injury; and (2) carelessly falling or catching her foot on the escalator steps. Plaintiff was seventy-eight years old (163a). For a period of approximately two years, she had been under specialized medical care for an arthritic condition in both knees (201-04a; 223-24a). The severity of this condition and the actual extent to which the condition affected the stability of plaintiff's legs are not reflected in the record. However, plaintiff's testimony does demonstrate that she was extremely concerned with the possibility of falling while on an escalator. While she expressly denied, at trial, that her clutching of the escalator handrail was related in any way to her being either unsteady on her feet or afraid of falling (210a), plaintiff's testimony in a deposition directly contradicts this statement. Rather, in much earlier testimony, plaintiff admitted:

> "[Q. And you had your left hand where?]
> A. On the railing of the escalator, held tight because I was afraid of falling" (210).

Indeed, as such evidence manifests, even as plaintiff walked on escalator B-7 on April 13, 1975, she was afraid of falling.

Consequently, in light of conflicting testimony concerning the extent of plaintiff's physical abilities and her perception of the risk of injury involved in using an escalator, it is clear that a question of fact is raised concerning plaintiff's "due care" in using escalator B-7 alone and without support. Resolution of this question was within the province of the jury, and not the court.

Similarly substantial testimony was admitted at trial indicating that plaintiff's accident may have been caused by plaintiff's own carelessness in falling and catching her foot on the escalator steps. Testimony admitted at trial concerning the exact cause of plaintiff's injury is incomplete, confusing and often contradictory. Plaintiff testified that she thought (or assumed) that her foot was injured when it became caught on the escalator (211-15a). This testimony is corroborated by plaintiff's contemporaneous statement to Patrolman Sova and to others at the scene of the accident (45a, 53a, 59-60a, 63-74a), and in plaintiff's hospital records (313). However, plaintiff was uncertain as to how or where she had caught her foot (211-15a). The inference is thus possible that plaintiff's foot was caught solely as a result of her own negligence.

Plaintiff further testified at trial that while on the B-7 escalator she at no time tripped, fell or felt dizzy or weak (176a, 216a). However, such testimony is directly contradicted by the testimony of usher Lloyd Cadogan, who emphatically stated that, hearing "a little hollering that somebody had fallen on the escalator" he went down the escalator and saw plaintiff "collapsed" and "crumpled on the steps." (71a, 273-74a). This account of plaintiff's injury is corroborated by the testimony of Patrolman

Sova who testified at a deposition that plaintiff had advised him at the scene of the accident that her foot had become caught on the escalator steps, causing her to fall (63a; but see 50a). In addition, both the hospital records and the testimony of Alexander Papas, M.D., the physician treating plaintiff's foot immediately after the accident, indicated that plaintiff's injury might well have been caused by a fall (179a, 312-13a). Thus in light of credible testimony tending to establish that plaintiff's injury may have occurred as the result of a fall and in the absence of incontrovertible evidence establishing the cause of such fall to be a defective condition in the escalator, the jury is entitled as trier-of-fact to accept the testimony of defendants' witnesses and to find plaintiff contributory negligent. See: *Wimpleberg* v. *Yonkers R.R.*, 83 A.D. 19, 21 (2nd Dept. 1903).

As the *Monroe* transcript demonstrates, at trial defendants introduced sufficient direct, affirmative evidence of plaintiff's contributory negligence to raise a question of fact for the jury on such issue. However, had defendants introduced no direct evidence of contributory negligence, a jury question would still have been raised on such issue. Plaintiff introduced no direct evidence of a defect in defendants' escalator. Rather, in an attempt to prove defendants' responsibility for the injury, plaintiff relied exclusively upon the doctrine of *res ipsa loquitur*, and her own testimony that the escalator reversed itself (215a, 221a) and that her hand was pulled back by the handrail (168a, 208-09a). Indeed, outside of plaintiff's own testimony, no testimony whatsoever of a defective condition in the escalator was admitted. In contrast, defendant presented substantial evidence that the escalator was functioning properly at all times and that plaintiff's injury must therefore have resulted from an outside force or from plaintiff's own negligence.

As trier-of-fact, the jury is entitled to determine the weight and credibility to be attributed to evidence properly admitted at trial. In light of the insubstantial and conflicting evidence admitted concerning plaintiff's conduct and the existence or non-existence of a defect in the escalator, the jury was entitled to discredit all or a portion of plaintiff's testimony and to conclude that plaintiff had not met her burden of proving freedom from contributory negligence. [See: *Binder* v. *Supermarkets General Corp.*, 48 A.D.2d 562 (2nd Dept. 1975); *Tornambe* v. *Tornambe*, 16 A.D.2d 680 (2nd Dept. (1962)]. Thus, in an early New York case in which the defendant introduced *no* direct evidence of contributory negligence but merely alleged that plaintiff's claimed accident had, in fact never occurred, the Appellate Division reversed the trial court's failure to charge contributory negligence. The court stated:

> "A defendant should have the right to have the question of the plaintiff's contributory negligence submitted to the jury whenever there is evidence, slight though it may be, from which the jury might infer that the plaintiff was guilty of contributory negligence. In the present case, the jury could have believed a part and rejected a part of the plaintiff's testimony, as he was a party in interest; and so also they could have rejected a part of the testimony of any other witness because inconsistent with the evidence of the defendant's witnesses, that no such accident occurred. The jury might have inferred from the defendant's evidence, though it was of a negative character, that the story of the accident was made out of whole cloth, and that no accident had occurred to the plaintiff in the manner stated by his witnesses, either through any negligence of the defendant or

> without contributory negligence on the part of the plaintiff." *Wimpleberg* v. *Yonkers R.R.*, 83 A.D. 19, 21 (2nd Dept. 1903).

Moreover where as in the instant case, plaintiff has relied upon the doctrine of *res ipsa loquitur* to establish defendants' liability by inference, the function of the jury as trier-of-fact to determine the question of contributory negligence is stretched to its broadest extent:

> "The alleged contributory negligence of an injured or decedent, and the causal relationship thereof to the injury or death, are matters for consideration in every case submitted on the theory of *res ipsa loquitur*. . . .
>
> Generally, also, in a *res ipsa loquitur* case, the issues pertaining to the alleged contributory negligence of the injured or decedent present questions of fact. In such a case, it is the function of the jury to draw, weigh and resolve all such inferences as might be deduced by a reasonable mind from the proven facts and circumstances. Therefore, where reasonable inferences would support a finding that the negligence of an injured or a decedent may have contributed to his injury or death, the issue of contributory negligence is properly submitted to the jury." *Braun* v. *Consolidated Edison Co.*, 31 A.D.2d 165, 169 (1968), *aff'd* 26 N.Y. 2d 825 (1970).

Similarly, in the instant case, the question of plaintiff's contributory negligence constituted a question of fact for the jury. Consequently, the trial court was reversibly in error in determining such question as a matter of law.

POINT II

Upon the evidence admitted at trial defendants were entitled to have the jury instructed in accordance with defendants' additional request to charge the trial court's denial of error.

Defendants appeal the trial court's refusal to instruct the jury in accordance with Defendants' Additional Request to Charge, that the jury could properly conclude from evidence of the escalator's proper operation before and after plaintiff's injury that the escalator was functioning properly at the time of plaintiff's injury.

At trial, defendants introduced substantial evidence of escalator B-7's proper functioning both immediately prior and immediately subsequent to plaintiff's injury. Mr. Lloyd Cadogan, the Conrail usher operating the escalator at the time of plaintiff's injury, testified that prior to opening the escalator for passenger use on April 13, 1975, he rode it to the bottom and determined that it was operating properly (95a, 272-73a). Mr. Richard Sova, a Penn Central police officer who assisted plaintiff after her injury, testified that within an hour after plaintiff's accident he examined the escalator and found that there was "nothing wrong with it" (49a). Patrolman Sova expressly testified that:

> "I examined the escalator and area around it, rode the escalator down and to the top, and found it to be in proper working order." (331a)

These conclusions were corroborated by Defendants' Exhibit "C", defendants' maintenance checklist for April 13, 1975, which indicated that despite a routine inspection, no report of a malfunction or operating problem for escalator B-7 was made on the day plaintiff alleged the escalator

had malfunctioned. (See 258a, 323a). Such conclusions were further corroborated by the express testimony of Mr. William Jackson and Mr. Harold Russell, both trained and experienced in the inspection, maintenance and repair of escalators, that escalator B-7 was personally inspected and found to be in proper operating condition on April 12, 1975, the day before plaintiff's injury, and on April 14, 1975, the day after plaintiff's injury (325-26a, 318-21a; see testimony of Louis Mandia at 265a). Indeed, the only direct evidence of any alleged defective condition occurring in the operation of the escalator is derived from plaintiff's own confused testimony that the escalator appeared to either stop or reverse itself and the escalator handrail appeared to go backwards, causing plaintiff to be drawn back and injured. (See, 168a, 208-09a, 213-15a, 221-22a, 230a).

Both federal and New York case law have long established that evidence of the prior or subsequent condition of an object is relevant to the condition of such object at a particular time. *Lewis* v. *Baker*, 526 F.2d 470 (2nd Cir. 1975); *Keohane* v. *N.Y. Central R.R.*, 418 F.2d 478 (2nd Cir. 1969); *DiLeo* v. *Lincoln Center for the Performing Arts, Inc.*, 38 A.D.2d 230 (2nd Dept. 1972). As the Second Circuit expressly stated in *Lewis*:

> "When the state of an object at a particular time is in issue, we have repeatedly upheld the relevancy of evidence of that object's condition before and after the time in question. . . . While the weight to be given evidence of prior and subsequent condition differs in each case and is of course a question for the trier of fact, it was proper for the trial judge to tell the jury that they might conclude or presume from that evidence a proper functioning during the interim." 418 F.2d at 475.

In the instant case, the trial court recognized the relevancy of defendants' evidence and properly permitted defendants to introduce substantial testimony of the escalator's functioning before and after plaintiff's injury. Indeed, the court specifically advised defendants, with respect to such evidence that "Sure. The jury can find that [the escalator was operating properly at the time plaintiff's injury]. I am going to let you argue it. . . ." (162a). Notwithstanding such admission, however, the court denied defendants' request to instruct the jury on the law permitting an inference of the escalator's proper operating condition, stating:

> "[T]hose are propositions that you may argue to the jury, but I will not charge them as a matter of law." (349a)

Pursuant to federal case law, a party is entitled, as of right, to have a jury instructed in accordance with his legal theories of a case if evidence exists to support those theories and if a proper request for such instructions is made. *Chicago & N.W. R.R.* v. *Green*, 164 F.2d 55, 61 (8th Cir. 1947). Where, as in the instant case, a party requests specific instructions which are in accord with the evidence admitted at trial, the substance of such instructions *must* be given unless otherwise covered in the court's general instructions. *Lind* v. *Aetna Casualty & Surety Co.*, 374 F.2d 377 (5th Cir. 1967); *Richardson* v. *Walsh Constr. Co.*, 334 F.2d 334 (3rd Cir. 1964). The trial court's refusal to instruct the jury in accordance with defendants' request concerning inferences permitted to be drawn from admittedly relevant evidence was therefore erroneous. In light of the essential importance of these inferences to defendants' liability and the insubstantial nature of plaintiff's direct evidence of a defective condition in the B-7 escalator, it is clear that with proper instructions, the jury might have found defendants free

of liability for plaintiff's injury. As the Fifth Circuit has stated:

> "Under proper instructions as to the law, resolution of the issues would have been possible but the jury never had a chance under these instructions. We therefore have a firm conviction that a mistake has been committed by the court and though the jury found that neither driver was negligent . . . whether it would have reached such a result with adequate instructions on the law, no one can say." *Lind* v. *Aetna Casualty & Surety Co., supra,* at 380, *quoting Marshall* v. *Isthmian Lines Inc.,* 334 F.2d 131, 137 (5th Cir. 1964).

Consequently, the judgment in favor of plaintiff should be reversed and a new trial granted defendants. See, *Delancey* v. *Motichek Towing Service, Inc.* 427 F.2d 897 (5th Cir. 1970); *Turner Constr. Co.* v. *Isthmian,* 240 F.2d 435 (1st Cir. 1957).

POINT III

The judgment in favor of the plaintiff should be reversed, and a new trial granted to the defendants.

Respectfully submitted,

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Of Counsel

Service of three (3) copies of
the within brief is
hereby admitted this 12 day
of November 1956.

Freehling & Freehling
Attorney for

by Elsie C Freehling